

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of) Appeal No. 95-0035
)
ESTATE OF MARVIN C. KINBERG,) DECISION
Appellant)
) August 1, 1997
_____)

STATEMENT OF THE CASE

Mrs. Frances Kinberg, as personal representative of the Estate of Marvin C. Kinberg, filed a timely appeal of an Initial Administrative Determination [IAD], issued by the Restricted Access Management Division [Division] on March 27, 1995. The IAD denied the Appellant's application for Quota Share [QS] under the Individual Fishing Quota [IFQ] program for Pacific halibut and sablefish because it was not filed by the July 15, 1994 application filing deadline. The Appellant has adequately shown that its interest is directly and adversely affected by the IAD.

An oral hearing was held in Anchorage before Appeals Officer James C. Hornaday on December 23, 1996. The following persons testified in person: Frances Kinberg, widow of Marvin C. Kinberg and personal representative of the estate; Pete Mandel, son of Mrs. Kinberg; Margo Mandel, daughter of Mrs. Kinberg; and Mrs. Kinberg's attorney, Donald Johnson. Two witnesses testified via telephone: Mrs. Kinberg's counselor, Stevens Montooth, M.R.C., L.M.F.T.; and Mrs. Kinberg's personal physician, John C. Mues, M.D.

Following the hearing, the Appellant was given until December 31, 1996, to file supplemental information. The Appellant filed a letter from Mrs. Kinberg, which supplemented her testimony at the hearing, and a letter from Judy K. Wahl, R.N., Chief of the Occupational Health Section, Preventive Medicine Department, Fort Wainwright, Alaska, and a former colleague of Mrs. Kinberg.

ISSUE

Whether NMFS should accept the Appellant's application as timely filed.

BACKGROUND

Marvin C. Kinberg commercially fished halibut in Southeast Alaska from 1983 through 1991 on his own vessel, the F/V PHANTOM. He died at home on September 29, 1992, as a result of a massive heart attack. Unaware that Mr. Kinberg had passed away, the Division, on or about December 20, 1993, mailed a Request for Application for Quota Share [RFA] packet to him at his last address known to the Division. On April 5, 1994, the Division sent a post card to Mr. Kinberg to remind him

to complete and return the RFA. On June 15, 1994, the Division mailed a second RFA packet to Mr. Kinberg, with a letter pointing out that the application filing deadline was only one month away.¹ Frances Kinberg, Mr. Kinberg's widow, was appointed personal representative of his estate in his will. Neither she nor anyone else on behalf of the estate responded to these RFAs/notices sent to Mr. Kinberg by the Division.

Mrs. Kinberg ultimately requested an RFA and submitted the completed forms, in the name of her late husband, in March 1995, some eight months after the application filing deadline. This application was summarily denied by the Division as untimely.

On appeal to this Office, Mrs. Kinberg acknowledged that she may have received the RFA packets and post card that the Division mailed to her husband in 1993 - 1994. She stated that she does not specifically recall receiving them, but that if she did she probably threw them away. Mrs. Kinberg and others testified that, from the time her husband died in 1992 until shortly before she submitted the RFA in 1995, she was suffering from severe depression resulting from grief over her husband's death and the death of her father three days later. Mrs. Kinberg and others, including her personal physician, also testified that during the entire period in question (and for another year afterward) she was taking a prescribed anti-anxiety drug, the side-effects of which include reduction of mental capacity, concentration, and short-term memory. Mrs. Kinberg argues that these circumstances constitute extraordinary circumstances beyond her control that prevented her from filing in a timely manner and that, therefore, the doctrine of equitable tolling should be applied in this case and the application of the estate should be deemed timely.

DISCUSSION

The widely recognized doctrine of equitable tolling permits an administrative agency, under limited circumstances, to toll the running of a federal application period while an applicant is suffering from a disability or incompetency that prevents the person from complying with the application deadline requirements. In our decision in John T. Coyne,² we concluded that the doctrine of equitable tolling can be applied to the IFQ application period. We stated that to obtain relief under this doctrine, an

¹The Kinbergs' address at the time was 3201 Khyber Circle in Anchorage. Mrs. Kinberg remained at that address after her husband's death until February 1995. [Mrs. Kinberg's hearing testimony] The Division no longer has a record of the address to which the two RFA packets and the post card were sent. The Division would most probably have used the latest address provided to them by the Alaska Commercial Fisheries Entry Commission in 1993, which was the Khyber Circle address. [Exhibit 4] Because of that fact, and because of the dates on which they were mailed, I presume that they were sent to the Khyber Circle address.

²Appeal No. 94-0012 (Decision on Reconsideration), May 24, 1996, at 13.

appellant must show three things: (1) extraordinary circumstances beyond the applicant's control prevented the applicant from filing in a timely manner; (2) the applicant was diligent in submitting an application after learning of the filing deadline [and after the disability to filing was removed]; and (3) implementation of the IFQ program would not have been harmed or frustrated if the application had been processed by the Division when it was submitted.³

1. Extraordinary circumstances

The first question is whether the Appellant's⁴ unique circumstances support the tolling of the application period in this case. Courts have used a variety of formulations to describe the nature of the circumstances that trigger equitable tolling. Usually the courts require extraordinary circumstances beyond the applicant's control that prevented the applicant from filing in a timely manner. These include circumstances such as mental incompetence, chronic alcoholism, minority, war, acts of god, misconduct by an opposing party, and the failure of a government agency to provide statutorily required individual notice. What all of these types of circumstances have in common is that they cause the applicant, for all or part of the application period, to be physically, mentally, emotionally, or legally unable to apply, or to be ignorant of the right or requirements of application and, thereby, effectively unable to apply.

An applicant need not be totally incapacitated for equitable tolling to apply; rather, a substantial incapacity or impairment can qualify if in fact it was sufficient to prevent the applicant from timely filing the application. In addition, the effects of the extraordinary circumstances on an applicant are not to be measured by the standard of a reasonable person, but by whether the particular applicant was in fact so affected.

Mrs. Kinberg offered her own statements and the testimony of several others to prove that she was substantially impaired during the IFQ application period and for approximately eight months afterward. She stated, "[M]y husband Marvin's death was a severe psychological trauma for me. He died suddenly on September 29, 1992 in our home of a massive heart attack. I discovered him unconscious and was unable to resuscitate him. Being a nurse, I felt I should have been able to save him and I experienced extreme guilt and depression." [Kinberg letter, 9/28/96, at 1]

"These events [the deaths of her husband and her father, three days apart] were very traumatic to me, and within a week I saw Dr. John Mues. I could not sleep, I could not think, I could not do anything. I could not even attend my father's funeral." [Kinberg letter, 12/10/96, at 1]

³*Id.*, at 13-14.

⁴For the purposes of this discussion, I will treat Mrs. Kinberg as the Appellant since, as personal representative, any circumstance or disability personal to her is attributable to the estate.

Two days after her husband died, Mrs. Kinberg began receiving treatment for depression from her personal physician, John C. Mues, M.D., Board Certified in Internal Medicine. Dr. Mues testified that he prescribed an anti-anxiety drug, Xanax,⁵ which Mrs. Kinberg continued to take until at least April 16, 1996. Dr. Mues stated that her stress continued to build through 1994, and that she did not begin to stabilize until April 1995. He stated that Mrs. Kinberg had told him during the course of her office visits that it was very difficult for her to deal with financial matters and any matters relating to her husband's estate.

Mrs. Kinberg also received counseling from Stevens Montooth, M.R.C., L.M.F.T. from December 1992 through July 1994. Mr. Montooth, who had previously counseled the Kinbergs as a couple, stated:

"When I saw Fran Kinberg last year (Winter 1994), I witnessed a very distraught women [sic] who was in a vegetative depression with symptoms of extreme isolation, sleep and nutritional disturbance and deficits in memory, concentration and activity. During this time Fran had great difficulty making basic decisions let alone any major decision. This was a substantial and shocking change from the woman I saw the year before Marv passed away. In the Mental Health Profession we diagnose people with these set of symptoms as a Major Depression, without psychotic features, related to complicated bereavement. Mrs. Kinberg could not make rational decisions about business or about her life." [Montooth letter, 4/24/95]

Mr. Montooth testified that Mrs. Kinberg was severely depressed, was unable to make out bills or respond to correspondence, and could not make decisions. She showed less interest in personal care, dress, and appearance. He said that by "vegetative depression" he meant that she was not communicating well, she had trouble with concentration and memory, she was overwhelmed by everything. "Just going to the grocery store was a major battle." [Montooth's hearing testimony]

At the time of Marvin Kinberg's death, Mrs. Kinberg was an Occupational Health Nurse at Fort Richardson and Fort Greely, Alaska. Judy Wahl, R.N., a colleague from Fort Wainwright, Alaska, stated that she consulted professionally and personally with Mrs. Kinberg. Ms. Wahl stated that Mrs. Kinberg took four weeks' leave immediately after her husband's death. She also said that after Mrs.

⁵Xanax is a trade name of the generic drug alprazolam, a triazolo 1,4 benzodiazepine analog. It is intended for the management of anxiety disorder, anxiety associated with depression, and panic disorder. Among its side-effects are: impaired memory, mental confusion, lightheadedness, headaches, sleep disturbances, drowsiness, lethargy, and stupor, among others. [Sources: Internet Mental Health (visited July 21, 1997) <<http://www.mentalhealth.com/drug/p30-x01.html>>; and Triple i Monograph, Pharmaceutical Information Network (visited July 21, 1997) <http://www.pharminfo.com/drugdb/monographs/iii_xanax.html>]

Kinberg returned to work, they called each other several times each day.

"I was very concerned about her, professionally and personally. Even though she would go to work, she would be very depressed and unable to function at her normal high level. During several of our conversations it seemed like an effort for her to talk, she wanted to go home and be by herself. This concerned me about what she might consider and I would call her on the weekends to make sure she was doing 'okay'. At times Frances sounded so stressed out and distraught, that I wanted to make sure she was still going to the counselor and possibly a support group that would be of benefit to her. Frequently she expressed to me that she functioned at a minimal level at home. She would not take phone calls, accept visitors, respond to written correspondence, and frequently threw mail away that was not addressed directly to her." [Wahl letter, 12/30/96, at 1-2]

During the period December 1993 through June 1994, Mrs. Kinberg took sick leave for all or part of 17 work days. [Kinberg letter, 12/27/96] Although she continued to work, Mrs. Kinberg stated that by March 1994 she was still not functioning normally: "Every night I would take my Xanax so I could sleep, get up in the morning and go to work (my job was as an administrator, which I could do by rote), come home and stare at the walls and go to sleep again." [Kinberg letter, 12/10/96, at 1] "Almost all I could do was go to my job every day which I knew I had to do until my eligibility to retire was secured." [Kinberg letter, 9/28/96, at 1] (Mrs. Kinberg did retire in March 1996, after 38 years as a nurse.)

Mrs. Kinberg's daughter, Margo Mandel, is a probation officer. She testified she was in the home when her stepfather died. She said that her mother was grieving and also felt guilt because she could not revive him, as she was a nurse. After the funeral, her mother went into a deep depression. She stayed off work, she didn't read or watch TV, which were her normal activities. Ms. Mandel said that her mother was a zombie and would stare at the wall. She said that before Marvin's death her mother was very independent and intelligent; after his death there was a profound change. She said she had to remind her mother of bills, counseling appointments, and tax returns, and that her mother told her she just had no interest in those things. Ms. Mandel testified that her mother had problems with details, such as going to the store. Mrs. Kinberg fell down at the grocery store, she was forgetful, and she could not remember where she placed items. Everyday matters were a major impediment to her. She would throw away mail that was addressed to her husband. Ms. Mandel said that the estate was a crisis that was overwhelming to her mother. [Margo Mandel's hearing testimony]

Mrs. Kinberg's son, Peter Mandel, is a youth counselor who has had some training in grief counseling and stress issues associated with grief. He stated that after Marvin's death, his mother was severely depressed. He said she had a hard time concentrating, her short-term memory was impaired, her sleep was irregular, and she could not make shopping lists. Mr. Mandel testified that his mother would lay

down on the couch after work, which she never used to do. He said that she made suicidal statements and had a general feeling of hopelessness. She did not want to go out to dinner and felt there wasn't any point to anything. [Peter Mandel's hearing testimony]

As personal representative of the estate, Mrs. Kinberg sought advice from a series of attorneys. The first attorney counseled her for a year following Marvin Kinberg's death. Mrs. Kinberg stated that she was dissatisfied with him and, in September 1993, she retained Anchorage attorney Donald Johnson. He stated that at one point during their relationship, Mrs. Kinberg withdrew her file and went to a third attorney, but after a short while she returned to him.

Mr. Johnson testified that he advised her primarily about the estate. He stated that Mrs. Kinberg was very distraught when she came to see him. He said that her speech was flat and slow, and she had no sparkle in her eyes. He testified that she had not resolved the grief issues. Mr. Johnson stated that she had difficulty understanding or dealing with matters relating to the estate. She would bring in a sack of bills and papers and expect him to sort it all out. He testified that Mrs. Kinberg had difficulty understanding matters relating to her late husband's interest in a close corporation, despite Mr. Johnson's attempts month after month to explain things to her. The corporation was started by Marvin's family and it ran a charter boat business. Mr. Johnson said that Mrs. Kinberg was fixated on her relationship with her brother-in-law's family in Sitka, and felt that they were treating her unfairly. [Johnson's hearing testimony]

Every witness at the hearing testified that Mrs. Kinberg's condition improved noticeably around February 1995, when she sold the house in which Marvin had died and moved to an apartment. Peter Mandel testified that "Living in the same house and sleeping in the same bed he [Marvin] had died in was extremely hard [for his mother]. There were so many reminders every morning when she woke up." [Peter Mandel's hearing testimony]

The witnesses all agree that during the IFQ application period, January 15 to July 15, 1994, Mrs. Kinberg was still in the throes of depression and was exhibiting some of the side-effects of Xanax. Mrs. Kinberg testified that this explains why she did not respond to the RFA packets when they were sent, nor did she inquire about the program with the Division or seek assistance from her attorney. She also stated that she was unaware of the significance of the quota shares and that the estate was eligible to apply. This ignorance about the IFQ program stemmed from her lack of interest in her husband's business when he was alive. It was compounded by her cloudy thinking and inability to deal effectively with her late husband's affairs.

"The medication I was on affects short term memory and ability to concentrate, especially over long term use such as mine. It was a very foggy time for me; effects of the medication made me stupid and dulled my intellect. It did not occur to me that IFQs could be awarded a fisherman following his death. I did not know or understand enough about IFQs to even ask the questions. In my normal state of

mind, I would have made the correct thought processes. Normally I believe I would have known that I needed to complete the application on behalf of the Estate during the time frame. If I had known the importance of applying for my husband's IFQs or, if someone had helped me through that time, because I needed direction, I would have asked for help in completing the application on time." [Kinberg letter, 9/28/96, at 2]

Instead, Mrs. Kinberg disregarded the materials that the Division sent to her husband. Apparently she threw them away. "I do remember that I discarded mail because it would make me cry. It never occurred to me that I could file an application on behalf of the estate. I thought his ability to have quota share ended with his death." [Kinberg's hearing testimony] As a result, "I failed to place any importance on mail addressed to my husband regarding the issue of Quota Shares. I regarded his notification to apply for Quota Shares in the IFQ Program as I regarded a letter of notification to renew his certification of physical fitness which I received one day- with extreme sadness. And so I placed them aside. I did not examine the mail addressed to my husband for the depressing effect it had on me." [Kinberg appeal, at 1-2]

If she had thoroughly read the materials that the Division sent, she could have learned then that the estate was eligible to apply for QS. The RFA form states: "If this application is made on behalf of the estate of a deceased fisherman, please provide the following information regarding the date of death, social security number, and estate representation. Attach copy of death certificate." The instructional materials accompanying the RFA forms state: "Note that some potential applicants may have passed away since the qualifying years, in which case their estate may apply for the quota share -- Form A contains questions relating to applications by estates."

None of the witnesses recalled Mrs. Kinberg ever mentioning the IFQ program to them before March 1995. Mr. Johnson, her attorney, testified that he did not discuss quota shares with her before then because he was unaware of the program. [Johnson's hearing testimony] Mrs. Kinberg stated that none of her three attorneys raised the subject of the IFQ program. On March 2, 1995, Mrs. Kinberg met with Charles Rigden, a Certified Public Accountant referred by Mr. Johnson to assess the value of Marvin Kinberg's business. It was then that Mr. Rigden asked Mrs. Kinberg if she had applied for QS on behalf of the estate. "I was shocked when he told me I was eligible to apply (for QS)." [Kinberg's hearing testimony] "This was the first time that I was made aware that the right to an IFQ survived Marvin's death and that it would have a value to the estate. Mr. Rigden urged me to file and I immediately obtained information about the program, obtained an application, filled it out, and sent it in." [Kinberg letter, 12/10/96, at 2]

Based on my consideration of all the evidence in the record, I find that Mrs. Kinberg did suffer from severe depression for a period of at least two and one-half years following her husband's death. I find it more likely than not that her ability to become informed about the rights and requirements of IFQ application on behalf of the estate, to respond effectively to the RFA packets and notices sent by the

Division, and to submit an application before March 1995 was substantially impaired as a result of her depression and the prescription drug she took to reduce anxiety. I find that Mrs. Kinberg's mental and emotional condition during the period January 1994 through March 1995 constitute extraordinary circumstances beyond her control that prevented her, on behalf of the Kinberg Estate, from submitting an IFQ application in a timely manner.

2. The applicant's diligence

The evidence in the record is that Mrs. Kinberg, as a result of her mental and emotional condition, did not learn of her right to apply for QS on behalf of the Kinberg Estate until March 2, 1995. She stated that she called the Division that same day. The Division's records show that she requested an RFA packet on March 2, 1995. Her completed RFA was received by the Division on March 23, 1995. I find that Mrs. Kinberg was diligent in submitting an application after learning of the filing deadline and after her disability to filing was removed.

3. Effects on implementation of the IFQ program

Mrs. Kinberg's application was submitted approximately eight months after the July 15, 1994 application filing deadline and about seven weeks after the record was established for the first annual IFQ calculation as required under 50 C.F.R. § 679.40(c) [formerly § 676.20(f)]. Regardless of how quickly the Division might have been able to process the application at that time, it would have been legally impossible to issue QS and an IFQ permit to the Kinberg Estate for the 1995 fishing season.⁶

Nonetheless, the fact that Mrs. Kinberg's application was not submitted in time for participation in the first fishing season under the IFQ program does not mean that processing her application would have harmed or frustrated implementation of the program. The Division accepted and processed numerous applications received after the filing deadline (but postmarked by the deadline) without apparent delay or disruption of program implementation. Likewise, the applications of several persons who were granted relief on appeal have been processed for the first time long after the filing deadline with no noticeable harm to the implementation of the program.⁷ Processing one more application, with at least

⁶50 C.F.R. § 679.40(c)(2) [formerly § 676.20(f)(2)] provides: "For purposes of calculating IFQs for any fishing year, the amount of a person's QS and the amount of the QS pool for any IFQ regulatory area will be in the amounts on record with the Alaska Region, NMFS, as of 1200 hours, A.l.t., on January 31 of that year."

⁷For example, the application of Wayne Brosman, Appeal No. 94-0007, was received by the Division 11 weeks after the filing deadline and was first processed after the appeal decision was affirmed by the Regional Director on January 13, 1995.

10 months' time to complete it before IFQs for the next fishing season would be issued, would not have been a serious imposition on the Division. Therefore, I find that implementation of the IFQ program would not have been harmed or frustrated if Mrs. Kinberg's application had been processed by the Division when it was submitted.

Having found that Mrs. Kinberg has established the three points necessary for application of the equitable tolling doctrine, I conclude that the doctrine applies to the IFQ application period in this case; that the period for filing an application in this case was tolled until at least March 23, 1995; and that Mrs. Kinberg's application was timely filed as a matter of law.

FINDINGS OF FACT

1. Mrs. Kinberg did suffer from severe depression for a period of at least two and one-half years following her husband's death.
2. Mrs. Kinberg's ability to become informed about the rights and requirements of IFQ application on behalf of the Kinberg Estate, to respond effectively to the RFA packets and notices sent by the Division, and to submit an application before March 1995 was substantially impaired as a result of her depression and the prescription drug she took to reduce anxiety.
3. Mrs. Kinberg's mental and emotional condition during the period January 1994 through March 1995 constitute extraordinary circumstances beyond her control that prevented her, on behalf of the Kinberg Estate, from submitting an IFQ application in a timely manner.
4. Mrs. Kinberg was diligent in submitting an application after learning of the filing deadline and after her disability to filing was removed.
5. Implementation of the IFQ program would not have been harmed or frustrated if Mrs. Kinberg's application had been processed by the Division when it was submitted.

CONCLUSIONS OF LAW

1. The doctrine of equitable tolling applies to the IFQ application period in this case.
2. The period for filing an IFQ application was tolled for the Appellant until March 23, 1995.
3. The appellant's application (RFA) was timely filed as a matter of law.

DISPOSITION AND ORDER

The Division IAD denying the Appellant's application as untimely filed is VACATED. The Division is ORDERED to process the application as if it had been timely filed. This Decision takes effect on September 2, 1997, unless by that date the Regional Administrator orders review of the Decision.

Any party, including the Division, may submit a Motion for Reconsideration, but it must be received at this Office not later than 4:30 p.m. Alaska Time, on the tenth day after the date of this Decision, August 11, 1997. A Motion for Reconsideration must be in writing, must allege one or more specific, material matters of fact or law that were overlooked or misunderstood by the Appeals Officer, and must be accompanied by a written statement or points and authorities in support of the motion. A timely Motion for Reconsideration will result in a stay of the effective date of the Decision pending a ruling on the motion or the issuance of a Decision on Reconsideration.

Because the prevailing party in this appeal still has an opportunity to receive QS and the corresponding IFQ for the 1997 fishing season, I recommend that the Regional Administrator expedite review of this Decision and, if there is no substantial disagreement with it, promptly affirm the decision and thereby give it an immediate effective date.

Edward H. Hein
Chief Appeals Officer